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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**

9 * * *

10 TIMOTHY SHEPARD,) Case No. 3:12-CV-00554-HDM-VPC
11 Plaintiff,)
12 v.)
13 ERIC K. SHINSEKI, SECRETARY,)
DEPARTMENT OF VETERANS AFFAIRS;)
14 EDWARD RUSSELL, in his official capacity;) **ANSWER TO COMPLAINT**
and ALAN BITTLER, in his official capacity,)
15 Defendants.)
16 _____)

17 COME NOW Defendants Eric Shinseki, Secretary, Department of Veterans Affairs;
18 Edward Russell, in his official capacity; and Alan Bittler, in his official capacity (collectively
19 Defendants), by and through their undersigned counsel, and answer the complaint as follows:

20 **JURISDICTION AND VENUE**

21 1. Paragraph 1 sets forth the purpose of this civil action, as alleged by Plaintiff, and does
22 not constitute allegations of fact. Therefore, no answer is required. To the extent an answer is
23 required, Defendants deny the allegations.

24 2. Paragraph 2 states Plaintiff's legal conclusions regarding jurisdiction rather than
25 allegations of fact and thus no answer is required. To the extent an answer is required, Defendants
26 deny the allegations.

1 3. Defendants admit that the acts and/or omissions complained about in Plaintiff's
2 Complaint occurred at the Department of Veterans Affairs Regional Office in Reno, Nevada, but
3 Defendants deny any allegations of unlawful employment practices. To the extent a further answer
4 is required, Defendants deny the allegations.

PARTIES

6 4. Defendants are without knowledge or information sufficient to form a belief as to the
7 truth of the allegations contained in Paragraph 4. To the extent a response is required, Defendants
8 deny Paragraph 4.

9 | 5. Defendants admit the allegations contained in Paragraph 5.

10 | 6. Defendants admit the allegations contained in Paragraph 6.

11 | 7. Defendants admit the allegations contained in Paragraph 7.

12 8. Defendants admit that Mr. Russell and Mr. Bittler were agents and representatives of
13 Secretary Shinseki. Defendants deny the remainder of Paragraph 8.

ADMINISTRATIVE PROCEDURES

15 9. Defendants deny the allegations contained in Paragraph 9. At the administrative
16 level, Plaintiff's claim was whether he was discriminated against based on color (brown), national
17 origin (Hispanic), disability (dyslexia & dysgraphia), age (over 40), and reprisal (prior EEO
18 activity), when the agency allegedly denied him a reasonable accommodation between November
19 4, 2010, and January 4, 2011. Plaintiff requested a hearing with the Equal Employment
20 Opportunity Commission on August 30, 2011. The parties, through their attorneys, stipulated and
21 agreed that the issues to be decided at the administrative hearing would include Plaintiff's
22 allegations of being denied a reasonable accommodation from the date of filing his complainant
23 through the date of the hearing: the time from January 4, 2011 through August 30, 2011. That
24 time frame exceeds 180 days.

25 10. Defendants admit that a Final Order was issued to Plaintiff by the Veterans Affairs
26 Office of Employment Discrimination Complaint Adjudication on July 27, 2012, which included a

1 notice of right to file a civil action within 90 days. Defendants lack knowledge or information
2 sufficient to form a belief as to the truth of the remainder of the allegations contained in Paragraph
3 10.

4 **FIRST CLAIM FOR RELIEF**

5 (Violation of 29 U.S.C. § 791 — Disability Discrimination)

6 11. Paragraph 11 of the Complaint is a statement of reincorporation to which no response
7 is necessary. To the extent an answer is required, Defendants incorporate herein their responses to
8 Paragraphs 1 through 10.

9 12. Defendants deny the allegations contained in Paragraph 12.

10 13. Defendants admit the allegations contained in Paragraph 13.

11 14. Defendants admit that during the time Plaintiff was on the Public Contact Team, there
12 were five teams: Triage, Pre-Determination, Post-Determination, Appeals and Public Contact.
13 Defendants admit that each Team performs a different function.

14 15. Defendants admit that the position description for a VSR is established by the United
15 States Department of Veterans Affairs Human Resource Center in Washington, D.C. and the pay
16 level is approved by the Office of Personnel Management. Defendants further admit that changes
17 are conducted in the same manner.

18 16. Defendants admit the allegations contained in Paragraph 16.

19 17. Defendants admit the allegations contained in Paragraph 17.

20 18. Defendants admit the allegations contained in Paragraph 18.

21 19. Defendants admit that Manual 21-1-Manual Rewrite ("M21-1-MR"), Part II, Chapter
22 1, states, "The Intake Specialist must not conduct personal interviews." Defendants deny the
23 remaining allegations contained in paragraph 19.

24 20. Defendants admit that Vice-Admiral Daniel Cooper, Veterans Affairs Undersecretary
25 for Benefits 2002-2008, put in writing that all Veterans Affairs offices utilizing VSRs must utilize
26 them in all five VSR categories. Defendants deny that the guidance continued after Vice-Admiral

1 Cooper stepped down from the position.

2 21. Defendants admit the allegations contained in Paragraph 21.

3 22. Defendants deny the allegations contained in Paragraph 22.

4 23. Defendants deny the allegations contained in Paragraph 23. Factor 3 — Guidelines
5 states:

6 Guidelines include agency manuals; e.g., the M21-1, M22-2, M23-1, M21-4,
7 regulations, court decisions, directives, EDP rules-based technology, and
procedural requirements of the various social insurance and special and
supplemental security income programs. These guides are numerous,
extensive, and complex. While the guidelines are generally applicable, the
VSR must use considerable judgment in the application of regulations to
research and resolve complex or highly unusual cases and in adapting
guidelines and procedures to individual case circumstances.

8 24. Defendants admit the allegations contained in Paragraph 24.

9 25. Defendants admit that Manual 21-1-Manual Rewrite, Part II, Chapter 1, states, "The
10 Intake Specialist must not conduct personal interviews" and Intake Specialists are responsible for
11 "referring visitors to a Veterans Service Representative ("VSR"), if a personal interview is
12 warranted."

13 26. Defendants admit that before eliminating the VSRs from Public Contact, Plaintiff was
14 marked fully successful during annual performance appraisals. Defendants deny the remaining
15 allegations contained in paragraph 26.

16 27. Defendants admit that they did not officially notify Plaintiff of the transfer until July
17 2010. Defendants admit that Plaintiff submitted documents after that date that stated Plaintiff had
18 the disabilities of dyslexia and dysgraphia. Defendants deny the remainder of Paragraph 27.

19 28. Defendants admit the allegations contained in Paragraph 28.

20 29. Defendants admit that Mr. Bittler elected to follow the Intake Specialist Position
21 Description rather than the M21-1-MR when he noticed a conflict between the two. Defendants
22 further admit that Mr. Bittler notified Compensation Services, the entity responsible for the
23 manual, of this decision.

1 30. Defendants deny that allowing Plaintiff to remain in Public Contact as a VSR would
2 not be an accommodation. Defendants lack sufficient knowledge or information as to whether
3 Plaintiff could not do the work of a VSR Predetermination Team member with accommodations.
4 Defendants admit that Plaintiff has stated that he would not be able to perform the duties.
5 Defendants admit the remainder of Paragraph 30.

6 31. Defendants admit the allegations contained in Paragraph 31.

7 32. Defendants deny the allegations contained in Paragraph 32.

8 33. Defendants deny the allegations contained in Paragraph 33.

9 34. Defendants deny the allegations contained in Paragraph 34.

10 35. Defendants deny the allegations contained in paragraph 35.

11 36. Defendants admit that Plaintiff repeatedly requested to be placed back as a VSR in
12 Public Contact. Defendants deny the remainder of Paragraph 36.

13 37. Defendants admit the allegations contained in Paragraph 37.

14 38. Defendants are without knowledge or information sufficient to form a belief as to
15 whether Plaintiff could not do the work of a VSR Predetermination Team member with
16 accommodations. Defendants admit that Plaintiff has stated he would not be able to perform the
17 duties.

18 39. Defendants lack knowledge or information sufficient to form a belief as to the truth of
19 the allegations contained in Paragraph 39. To the extent a response is required, Defendants deny
20 the allegations contained in Paragraph 39.

21 40. Defendants deny the allegations contained in Paragraph 40.

22 41. Defendants deny the allegations contained in Paragraph 41.

23 42. Defendants deny the allegations contained in Paragraph 42.

24 43. Defendants deny the allegations contained in Paragraph 43.

25 44. Defendants deny the allegations contained in Paragraph 44.

26 45. Defendants deny the allegations contained in Paragraph 45.

46. Defendants deny the allegations contained in Paragraph 46.

47. Defendants deny the allegations contained in Paragraph 47.

JURY DEMAND

48. Paragraph 48 contains Plaintiff's request for a jury trial rather than allegations of fact and thus no answer is required. Insofar as an answer may be required, the Civil Rights Act of 1991 provides for a jury trial in Title VII cases where compensatory damages are sought.

49. Defendants deny all allegations of the complaint not hereinabove expressly admitted.

AFFIRMATIVE DEFENSES

1. Plaintiff has failed to state a claim upon which relief may be granted.

2.. This action is barred by the doctrine of res judicata.

3. Defendants were unaware of Plaintiff's disability before making the July 2010

business decision to move the Public Contact Team VSRs to other VSR Teams. In July 2010, the agency informed Plaintiff that all Public Contact VSR positions, including his, would be moved to the Predetermination Team. Before that time, Plaintiff did not put Defendants on notice that he suffers from a disability.

4. The move of Public Contact Team VSRs was based solely on business necessity, as determined by the leadership at the Reno Veterans Affairs Regional Office.

5. Defendants engaged in the interactive process to provide Plaintiff a reasonable accommodation. Plaintiff, however, was unable to perform the duties of a Predetermination Team VSR. As a reasonable accommodation, Plaintiff was offered the position of Claims Assistant/Intake Specialist. He accepted this position on December 5, 2011, to be effected January 3, 2012. Plaintiff, however, resigned on December 20, 2012.

6. This action is barred by the doctrines of waiver, laches and estoppel.

7. Plaintiff has failed to exhaust his administrative remedies for the claims alleged.

8. Plaintiff's damages, if any, are limited to the amount stated in the administrative claim.

- 1 9. Plaintiff has failed to mitigate his damages.
- 2 10. Defendants have not been properly served.
- 3 11. The Court lacks subject matter jurisdiction to decide this claim.
- 4 12. Plaintiff's employment charge was untimely submitted.
- 5 13. Punitive damages are not recoverable.

6 Defendants reserve the right to amend their Answer with additional defenses of which they
7 may become aware as discovery progresses and to raise any other matter constituting an avoidance
8 or affirmative defense.

9 WHEREFORE, Defendants pray for judgment as follows:

- 10 1. That judgment be entered in favor of Defendants and against Plaintiff,
- 11 2. That Plaintiff take nothing by way of his complaint,
- 12 3. For costs of suit and
- 13 4. For such other relief as may be proper.

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15 Respectfully submitted,

16 DANIEL G. BOGDEN
17 United States Attorney

18 /s/ Holly A. Vance
19 HOLLY A. VANCE
20 Assistant United States Attorney

CERTIFICATE OF SERVICE

10 It is hereby certified that service of the foregoing ANSWER TO COMPLAINT was made
11 through the Court's electronic filing and notice system or, as appropriate, by sending a copy of
same by first class mail, addressed to the following addressees, on this 5th day of February, 2013.

Addressee:

JEFFREY S. BLANCK, ESQ.
485 West Fifth Street
Reno, NV 89503

/s/ Holly A. Vance
HOLLY A. VANCE